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IN THE

Supreme Court of the United States

October Term, 1958

No. 250

BAUER-SMITH DREDGING CO., INC.,
Petitioner-Defendant below,

v.

ROY TULLY, ET AL.,
Respondents-Plaintiffs below.

Petition for Writ of Certiorari to the Court of Civil Appeals Ninth Supreme Judicial District, Beaumont, Texas

MOTION OF THE NATIONAL ASSOCIATION OF RIVER AND HARBOR CONTRACTORS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE IN SUPPORT THEREOF

ROBERT E. KLINE, JR.
RONALD A. CATONE
917 Munsey Building
Washington 4, D. C.
Attorneys for Amicus Curiae The National Association of River and Harbor Contractors

Of Counsel:

KIRLIN, CAMPBELL & KEATING

August 14, 1958

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MOTION OF THE NATIONAL ASSOCIATION OF RIVER AND HARBOR CONTRACTORS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The National Association of River and Harbor Contractors, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully moves for leave to file the brief annexed hereto in support of the Petition for a Writ of Certiorari.

Consent to the filing of said brief was granted by petitioner but was denied by respondents.

The members of The National Association of River and Harbor Contractors, consisting of 29 companies,*

* The names of member companies are:

American Dredging Company
Philadelphia, Pa.
Arundel Corporation, The
Baltimore, Md.
Atkinson Dredging Company
Norfolk, Va.
Atlantic, Gulf & Pacific Co.
New York, N. Y.
Construction Aggregates Corp.
Chicago, Ill.
Cottrell Contracting Corporation
Norfolk, Va.
Dunbar & Sullivan Dredging Co.
Detroit, Mich.
Fitz Simons & Connel Dredge & Dock Division
Chicago, Ill.
Franks Dredging Company
Long Beach, Calif.
Gahagan Dredging Corporation
New York, N. Y.
General Construction Company
Seattle, Wash.
Gibson & Cushman, Inc.
Bay Shore, L. I., N. Y.
Gillen, Edward E., Company
Milwaukee, Wisconsin
Great Lakes Dredge & Dock Company
Chicago, Ill.
Hawaiian Dredging & Construction Company, Ltd.
Honolulu, T. H.
Hill Dredging Corp.
Atlantic City, N. J.
Hydraulic Dredging Company, Ltd.
Oakland, Calif.
Jahncke Service, Inc.
New Orleans, La.
McWilliams Dredging Company
New Orleans, La.
Merritt-Chapman & Scott Corporation
New York, N. Y.
Merritt Dredging Company
Charleston, S. C.
Norfolk Dredging Company
Norfolk, Va.
North Atlantic Dredging Company
East Boston, Mass.
Pacific Dredging Co.
Paramount, Calif.
Perini Corporation-Marine Division
East Boston, Mass.
Price Brothers-McClung, Inc.
Toledo, Ohio
Puget Sound Dredging Co.
Seattle, Wash.
Standard Dredging Corporation
New York, N. Y.
Western Contracting Corporation
Sioux City, Iowa

include substantially all of the companies engaged in dredging work in the United States. Dredging work is done by members of the Association under contracts whose terms and conditions, including those relating to disposal of dredged material on riparian lands, are similar, if not identical, to those involved in the dredging project which is the subject of the present litigation. It has long been the understanding of the dredging industry, and heretofore undisputed, that the rights and immunities obtained by the United States from riparian landowners under dredging easements were available to dredging companies as defenses against claims for damages by servient riparian landowners where the dredging companies had complied with all of the conditions in the contracts, including those relating to disposal of dredged material, and where the United States has supervised and formally approved and accepted *all* work done under the contracts, including the manner and areas in which the companies had deposited the dredged material. It has long been accepted that issuance of Certificates of Completion by the United States to the dredging companies, and payment for all services rendered under the dredging contracts, constitutes approval, adoption and ratification by the United States of the acts of the dredging companies in prosecuting the dredging contracts to their conclusions, including acts relating to the disposal of dredged material.

It has also been the belief of the dredging industry that, if a suit were to be instituted in a State Court by a riparian landowner for alleged damages to his property as the result of the performance of a dredging contract with the United States, the dredging company would have the right to remove the action to a Federal

District Court where the United States could be impleaded as an indispensable party.

The decisions of the Texas State Courts and of the United States District Court for the Eastern District of Texas, Beaumont Division, which are contrary to the above understandings of the dredging industry, are also in conflict with the decisions of this Court, and are therefore of immediate interest and grave concern to the dredging industry, since those decisions seriously affect substantive and procedural rights and obligations under existing and prospective dredging contracts with the United States. Indeed, the issues presented by this litigation are also of vital concern to the United States, which ultimately must bear the cost of maintaining and improving our navigable waters.

It is therefore respectfully submitted that the issues here involved have a broader consequence and transcend the interests of these particular litigants, and that the views of the dredging industry, as presented by this Association, will be of assistance to this Court.

Respectfully submitted,

ROBERT E. KLINE, JR.
RONALD A. CAPONE
917 Munsey Building
Washington 4, D. C.
Attorneys for Amicus Curiae
The National Association of
River and Harbor Contractors

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BRIEF OF THE NATIONAL ASSOCIATION OF RIVER AND HARBOR CONTRACTORS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST

The interest of The National Association of River and Harbor Contractors in this cause is set forth in its motion to which this brief is annexed.

SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

A. The Decisions of the Texas Courts Are Not in Accord With Decisions of This Court

As indicated in Petitioner's Statement of the Case (Pet., 9 et seq.) and in the opinion of the Court of Civil Appeals, Ninth Supreme Judicial District of Texas (Pet. Blue App., 25 et seq.), the instant litigation involves a contract between petitioner, a Texas dredging company, and the United States, acting through the Department of the Army, for dredging the Intracoastal Canal under the supervision of the Corps of Engineers. Under the terms of the contract, petitioner was required to deposit, and did deposit,** dredged material on respondents' land adjoining the canal in spoil areas which were designated in the contract plans and specifications.

Under an easement granted by respondents (quoted in Petition at p. 25, et seq.), the United States had the right to dump spoil and dredged material on the lands of respondents in the precise areas where it was deposited by petitioner. Indeed, the Texas Court of Civil Appeals itself held that—

** Respondents apparently recovered damages allegedly caused by the deposit of dredged material in respondents' fresh water reservoir and irrigation system, as well as the flow or seepage of dredged material and salt water into a lead ditch, plus resulting injury to a rice crop seven miles away. Although the dredging chart contained a notation that "no dredged material shall be allowed to enter" the lead ditch (Pet. Blue App. 26), the drawing and specifications did not contain any reference to respondents' fresh water reservoir or irrigation system. Furthermore, *all* of the dredged material was deposited in areas designated in the dredging contract, including that which allegedly flowed or seeped into the lead ditch; and the Government did approve and adopt petitioner's acts relating to the manner and areas in which the dredged material was deposited.

"The right of way easement and grant therefore would be a defense in law to a suit of appellees against the United States of America" (Pet. Blue App. 46-47).

At the conclusion of the work, the United States, acting through the Army Corps of Engineers, inspected the dredged material deposited on respondents' land, and, with full knowledge of respondents' assertion of a claim for damages, issued to petitioner a Certificate of Completion (quoted at p. 10 of Petition), certifying that the work was performed *in accordance with the contract terms*, which necessarily included approval of the place and manner in which the dredged materials had been deposited in spoil areas designated in the plans and specifications, and paid petitioner in full for the work it had performed.

Despite the fact that the United States had the right under easement to do exactly what was done here by petitioner without incurring any liability, and despite full Government approval, adoption and ratification of petitioner's acts as evidenced by the Certificate of Completion, suit was filed by respondents and a judgment was entered against petitioner at the trial court level for trespass and damages incurred as a result of petitioner's performance of its dredging contract in a manner which respondents claimed exceeded the authority and directions set forth in the Government contract. The Court of Civil Appeals affirmed on the ground petitioner had negligently and wilfully dumped spoil and dredged material "at places not designated for such dumping in its contract" (Pet. Blue App. 47).

The decision of the Texas Court of Civil Appeals rested upon an erroneous application of the principle that an agent or officer of the Government may be

held personally liable where he has exceeded his authority or where the authority granted to him has not been validly conferred (Pet. Blue App. 47), citing *Yearsley* v. *Ross Construction Company*, 309 U.S. 18, and *Converse* v. *Portsmouth Cotton Oil & Refining Corp.*, 281 F. 981, and on the erroneous conclusion that the United States did not and could not approve, adopt and ratify acts (Pet. Blue App. 48-49) which the Government itself could have lawfully done, under specific easement and the applicable statutes.

Since the United States had the right under easement to deposit dredged material exactly where petitioner did deposit it, it is obvious that the Texas Court erred in concluding that the United States, acting through its duly designated officials, could not lawfully authorize, direct, approve, adopt and ratify the manner and place in which petitioner was to deposit and did deposit the dredged material. It is equally clear, from the terms of the Certificate of Completion and the circumstances under which it was issued, that the United States did in fact consider that petitioner had fully and properly complied with the contract requirements relating to the deposit of dredged material, and approved, adopted and ratified petitioner's acts in respect thereto.

Not only is the decision of the appellate court erroneous on its face, but also it is in direct conflict with *Yearsley* v. *Ross Construction Company*, 309 U.S. 18, wherein this Court noted that "there is no contention, *or basis for one*, that if the contractor was acting for the government in prosecuting its work in the aid of navigation without the taking of property, the contractor would be subject to the asserted liability." (309 U.S. at 23).

See also *General Box Company* v. *United States*, 351 U.S. 159, wherein this Court held that, since a Louisiana Levee Board had the right to destroy certain timber without compensating the owner, and since it had granted that right to the United States, the owner of the timber was not entitled to recover just compensation from the United States under the Federal Constitution for timber destroyed by the Government contractor. So in the instant case, since the United States had the right under easement to dump the spoil where petitioner did, and directed, approved and ratified petitioner's acts, respondents are not entitled to recover damages from petitioner.

Furthermore, since the United States had the right under the Commerce Clause of the Constitution, the Rivers and Harbors Acts (Pet. App. 1-4), and the specific dredging easement to do precisely what was done here by petitioner, whose performance was approved and adopted by the United States, there was no duty owing to respondents and no invasion of a legal right upon which respondents could base a claim for damages. See *Larson* v. *D. & F. Commerce Corp.*, 337 U.S. 682 at 693.

The decision below is also in conflict with the well-established principal in the field of agency that "An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have the agent do it and has authorized the agent to do it." *Restatement of the Law of Agency*, Section 343 and 345.

Converse v. *Portsmouth Cotton Oil & Refining Corp.*, 281 F. 981, relied upon by the Court below, is not in point for the reason that the dredging contract there did not *specify*, as did the one in the present

litigation, and as do many present-day dredging contracts, the areas in which dredged material was to be deposited.

B. The Case Presents Issues of Importance to the Dredging Industry, the United States, and the American Taxpayer

The issues presented in this case, as listed at pages 3 to 6 of the Petition, are a matter of concern not only to the particular litigants, but they are also of vital interest to all dredging companies, the United States, and ultimately to the taxpaying public. To illustrate—

As noted at page 19 of the Petition, a substantial number of dredging projects involving millions of dollars (over 1.6 billion dollars was appropriated by Congress for rivers, harbors, canals and flood-control projects in 1958) are authorized each year by Congress. Many of these contracts cover the dredging of miles of navigable inland waterways and require the deposit of dredged material on countless acres of riparian land. The cost involved in disposing of dredged material is of course a most important factor to dredging companies, and in the final analysis to the United States and the American taxpayer. The Government and its dredging contractors have long been accustomed to rely upon dredging easements and the rights and immunities granted to the United States thereunder in order to dredge channels in the most efficient and least costly manner possible. They have not considered it necessary to include in their estimates and bids a reserve to cover possible contingent liability to riparian owners who had already granted to the United States the right to dredge and deposit spoil on their properties. However, if the dredging

contractors, in fulfilling their contractual obligations to the United States, are at the same time to be exposed to liability for damages claimed by servient riparian landowners based upon an alleged breach of the contract with the United States, the dredging companies will be compelled to include in their future bids a reserve to cover these contingent liabilities to adjacent landowners. Inevitably, if the decisions below are permitted to stand, the United States and the American taxpayer will be confronted with an increase in the cost of dredging and maintaining navigable waterways.

Manifestly, therefore, it is a matter of grave concern to the dredging industry, to the United States, and to the public, as to whether the easement rights and immunities granted to the United States by servient riparian landowners are available to dredging companies who deposit dredged material in areas covered by easements which are specifically designated in contract plans and specifications. Also of concern is the question as to whether riparian landowners, who would not be entitled because of the dredging easements to recover damages in a suit filed directly against the United States, could in effect nullify the easement rights and obtain compensation from the United States by the indirect procedure of suing the dredging contractors, who in turn would seek reimbursement from the United States. These, among other issues, are clearly of sufficient public importance to warrant their resolution by this Court.

Closely related to the foregoing, and also of grave concern to the dredging industry, is whether the Texas Court was correct in taking the apparent position that a Certificate of Completion applies only to that part

of a dredging contract relating to cutting the channel to a specified depth and width, but it does not apply to the manner and areas in which the dredged material is to be deposited although specified in the contract, and that the Certificate of Completion cannot be construed as approval and adoption by the United States of the contractor's acts in respect to disposal of the dredged material. Certificates similar to the one here involved are issued at the conclusion of every Government dredging contract, and their issuance has always been considered by the contracting parties as evidence that the contract *in its entirety* has been satisfactorily performed. Obviously, the force and effect to be given to such certificates, and particularly whether such certificates are evidence of United States approval, adoption and ratification of the manner and areas in which dredged material has been deposited, is an issue of utmost importance to the dredging industry, to the United States, and eventually to the taxpaying public.

The principal ground upon which the decisions below rested was that the dredging company had not complied with contractual requirements. Here again, it is of vital importance to all dredging companies and to the United States to know whether, contrary to what they conceived to be the law, strangers to a dredging contract can attack a formal determination by the United States, acting through the Army Corps of Engineers, that the dredging company has complied with and has satisfactorily performed all of the contractual requirements, and whether persons who are not parties to the contract can recover damages based upon an alleged breach thereof.

The decision and order of the United States District Court for the Eastern District of Texas (Pet. Blue App. 51-52) remanding the present case to the local courts of Texas, and the decisions of the State Courts, also present jurisdictional questions of serious concern to the members of this Association. As a result of the decisions below, dredging companies in general are now confronted with the possibility of being sued in State courts where they are deprived, as was petitioner here, of the right to implead the United States as an indispensable party and to have a Federal court decide the Federal questions involved in controversies with riparian landowners. If they are sued and lose, they will be faced with the necessity of seeking to obtain reimbursement from the Federal Government in the Court of Claims or the District Courts for damages recovered by riparian landowners, and thus will be subjected to an unnecessary multiplicity of suits.

It would also seem that the other jurisdictional issues raised in the Petition, i.e., whether respondents' claim involves Federal questions, whether such a claim is within the exclusive admiralty jurisdiction of the Federal courts under 46 U.S.C. 740, and whether uniform principles of maritime law and procedure are applicable to claims of this sort, are all of sufficient importance to the dredging industry, and indeed to the United States as a party to dredging contracts, to warrant the grant of the Petition for a Writ of Certiorari.

CONCLUSION

For the reasons set forth in the Petition, as well as those referred to above, it is respectfully requested that this Court issue a Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas.

Respectfully submitted,

ROBERT E. KLINE, JR.
RONALD A. CAPONE
917 Munsey Building
Washington 4, D. C.
Attorneys for Amicus Curiae
The National Association of
River and Harbor Contractors

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